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September 24, 2001

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Secretary Ms. Magalie Roman Salis
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: Docket No. 95-155 (Glock v. AmeriCom Network Inc., et al)

Dear Secretary Magalie Roman Salis:

Enclosed please find my Comments on Petition for Waiver in Limited Instance in the above referenced matter. I kindly ask that you distribute this material to all appropriate parties. In addition, as an interested party, I respectfully request that my name be added to the mailing list for all previous or future notices regarding this matter. My address is as follows:

Larry E. Brown
P.O. Box 1208
Ash Fork, AZ 86320

Thank you in advance for your prompt and courteous assistance.

Sincerely,

Larry E. Brown

Enclosure
cc: Diane Harmon - FCC
Jennifer Gorny, Esq. - FCC
Christine Hayes Hickey – Rubin & Levin, P.C.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Network Services Division
Washington, D.C. 20554

In the Matter of:	)	
	)	
Waiver of Rule Prohibiting Transfer of	)	CC Docket No. 95-155
Toll Free Numbers in Limited Instance	)	
(Re: Alan & Carolyn Glock v. AmeriCom Network, et al)	)	
	)	

COMMENTS ON PETITION FOR WAIVER IN LIMITED INSTANCE

Larry E. Brown, an officer of AmeriCom Network, Inc. ("*AmeriCom*"), hereby submits comments opposing the Petition for Waiver in Limited Instance (the "*Petition*") submitted in the above captioned proceeding by counsel for Alan and Carolyn Glock (the "*Glocks*", collectively). The following is respectively shown:

I. INTRODUCTION AND BACKGROUND

1. *AmeriCom* was founded as a marketing-based service company which will offer comprehensive marketing programs to a nationwide network of independent and regional companies. *AmeriCom's* goal is to provide these smaller concerns with effective and affordable national advertising as a means of competing against the well-funded national and international conglomerates. One of the crucial elements of these ad campaigns will be the inclusion of one easy-to-remember toll free "vanity" number whereby customers from around the country can call the same number to be connected to local service providers. Calls generated within a specific

area/zip code or LATA boundary will automatically be routed to the *AmeriCom* client who services that particular region.

This concept, whereby one number will service several thousands of companies nationwide (who might otherwise secure a number for regional use only), is commonly referred to as "shared-use". Shared-use programs provide maximum utilization of toll free numbers and therefore promote the Commission's goal to conserve these vital resources.

2. Upon incorporation, *AmeriCom* acquired the rights to use two such vanity numbers from a founding officer, Darlene Roberts. The numbers are (800) We Deliver and (800) Free Delivery[1]. Both of these numbers have been personally held by Ms. Roberts for approximately 15 years and 7 years, respectively.

3. Dr. Alan Glock and his wife, Carolyn, are accredited investors who invested in the company in April 1998. The *Glocks* hold a 10% interest in the common stock of *AmeriCom* through Glock Communications, a holding company created for the purpose of this investment.

4. Prior to their investment it was fully disclosed to the *Glocks* that *AmeriCom* was a start-up company that had no revenues or any other source of income and, furthermore, that there were no assurances of success in developing revenues from this venture.

5. Six months after their investment the *Glocks* became disgruntled from the lack of a quick return on their investment. In April 1999, a year after their initial investment, the *Glocks* initiated a civil complaint in the U.S. District Court of Indiana (the "*Court*") against *AmeriCom* and its two principle officers, Larry E. Brown and Darlene Roberts.

[1] In addition to *(800) Free Delivery*, AmeriCom subsequently secured the rights to use the 888 and 877 version of *Free Delivery*. The 'Free Delivery' series will be used for separate purposes, i.e., one for a customer-direct order line, another for a customer service call center and the third for a dedicated fax line.

6. Filing Pro Se the principles were dismissed either by the *Court* or at the request of the *Glock's* counsel (the "*Petitioners*"). *AmeriCom*, however, was financially unable to secure counsel and the *Glocks* were able to obtain a default judgment (the "*Judgment*") for monetary damages against *AmeriCom* in January 2000.

7. In subsequent proceedings the two individual codefendants petitioned the *Court* for the ability to proceed with the company's business plan in order to generate the revenues and profits necessary to satisfy the *Judgment*. (The defendants informed the *Court* that they had 3 clients ready to sign up for *AmeriCom's* program.) That request was denied, which effectively put a halt to the company's operations. To date *AmeriCom* has been in full compliance with the *Court* order (Exhibit B, *Petition*) prohibiting the company and its officers from the "transfer, *encumbrance* or disposal of the numbers" (emphasis added for meaningful reference).

8. In November 2000, the *Glock's* counsel submitted to the *Court* a document titled "Post Hearing Memorandum of Law in Support of Motion for Order of Transfer/Turnover" (the "*Post Hearing Memo*"), attached as Exhibit 1. This document contained specific details to solicit the Commission for approval to transfer *AmeriCom's* toll free numbers to the *Petitioners* and then selling said numbers via a public Internet auction.

In his reply to the *Post Hearing Memo*, defendant Brown notified the *Court* that such a proposal was in strict violation of the Commission's rules and regulations. Nonetheless, the *Court* granted its approval for the *Glocks* to proceed with their petition.

9. On August 26 2001, *AmeriCom* and the 2 codefendants filed for an appeal with the Seventh Circuit Court of Appeals (Exhibit 2).

II. DISCUSSION

10. Regarding Item 2 of Petition: *AmeriCom* is in strict compliance and abides by all Commission rules and regulations. Pursuant to 47 C.F.R. § 52.107, the company and its officers forbid the practice of 'hoarding' or 'warehousing' of numbers. More importantly, neither the company nor its officers have ever been accused of such practices and any inference or implied allegations of such shall be soundly dismissed.

11. Regarding Item 3 of Petition: The original cause was finalized on July 26, 2001 (Exhibit 3). However, this matter is still pending since, as previously stated, all of the originally named defendants have filed for an appeal. Additionally, I assert that since this was a judgment by default the true and exact nature of *AmeriCom's* guilt or innocence has not been appropriately determined by a court of law.

12. Regarding Item 4 of Petition: As a post hearing remedy, no payments towards the *Judgment* were tendered prior to the conclusion of the original civil action. Furthermore, this action is under appellate review.

13. Regarding Item 6 and 7 of Petition: The order directing that "the Vanity Numbers shall be transferred from AmeriCom Network, Inc., liquidated and sold" (Exhibits C, *Petition*) should be considered in the strictest sense. Such an order is beyond the jurisdiction of the *Court* and no precedent is cited granting a civil court the power to interpret matters of Commission authority. Therefore, any directive from the *Court* shall be without merit.

14. The "Play Time v. LDDS Metromedia Communications, Inc." cited as support in the *Post Hearing Memo* is certainly very unique, and the circumstances in said case are in every aspect dissimilar to the circumstances involving this matter. Therefore, this citing is irrelevant and bears no weight in regards to this matter.

15. Regarding Item 9 of Petition: The Commission prudently reserves the right to amend its rules and regulations under truly extraordinary circumstances. However, the *Petition* falls far short of meeting that criteria. More importantly, the granting of such a petition sets a dangerous precedent and allows other similarly inappropriate cases to be brought before the Commission.

16. Regarding Item 10 of Petition: Denying the *Petition* would neither "render the Judgment uncollectible" nor "leave the petitioners without a remedy or other form of relief". To the contrary the default judgment would remain in effect, pending the outcome of the appeal. In addition, the most obvious form of relief will be from the profits generated by the company's operations. After all, this was the primary purpose and original intent of the *Glock's* investment.

17. Regarding Item 12 of Petition: To the contrary, the *Petition* directly involves the general public by virtue of the fact that the *Petitioners* intend to sell the numbers by way of an open Internet auction to an international general community. In terms of "the interest of justice", I believe the Commission is not the proper venue for matters of collection on a default judgment. Such matters are more appropriately pursued through other means.

III. SUMMARY

18. The *Petitioners* did not provide *AmeriCom* or other interested parties with a copy of the *Petition* as evidenced by the Certificate of Service. This lack of proper service, combined with the omission of the same from the return distribution list, would be adequate grounds alone for a denial of the *Petition* in a standard court of law. There should be no less a standard for the Commission.

19. Item 13 of *Petition* expresses a "desire for an expedited ruling" which, I assert, unveils their true desire for a quick ruling by the Commission without having full knowledge of all the facts. As such, the *Petition* should be viewed with a high degree of suspicion.

20. The *Petition* was purposely vague and misleading in the specific intent to sell the numbers by an open public auction in direct violation of the Commission's rules and regulations.

21. Items 18 through 20 herein above do not demonstrate good faith dealings and can even be construed as a form of deceptive practice regarding the Commission.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Larry E. Brown respectively requests that the Commission reaffirm its sound policy prohibiting the sale of toll free numbers by denying the *Petition* in its entirety.

Dated: September 24, 2001

Respectively submitted,

By: _____

Larry E. Brown
P.O. Box 1208
Ash Fork, AZ 86320
(928) 637-0340

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been sent via prepaid postage to the following individuals or entities on this 24th day of September, 2001.

Diane Harmon
Chief of Network Services Division
Federal Communications Commission
Room 6A, 207
445 12th Street SW
Washington, D.C., 20554

Jennifer Gorny, Esq.
Federal Communications Commission
Room 6A, 207
445 12th Street SW
Washington, D.C., 20554

Christine Hayes Hickey
c/o Rubin & Levin, P.C.
500 Marott Center
342 Massachusetts Ave.
Indianapolis, IN 46204-2161

By: Larry E. Brown

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

ALAN GLOCK and CAROLYN GLOCK,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
AMERICOM NETWORK, INC.,	)	
LARRY E. BROWN, and	)	Cause No. IP99-542-C-M/S
DARLENE D. ROBERTS,	)	
	)	
Defendants,	)	
	)	
CABLE & WIRELESS,	)	
AT&T LONG DISTANCE BUSINESS,	)	
DARLENE D. ROBERTS, and	)	
LARRY E. BROWN,	)	
	)	
Garnishee Defendants.	)	

POST-HEARING MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ORDER OF TRANSFER/TURNOVER

Come now the plaintiffs, by counsel, and the Court having heard evidence and argument on Plaintiffs' Verified Motion for Proceeding Supplemental as to Americom Network, Inc. and for Order of Transfer/ Turnover at a hearing on August 7, 2000, at which plaintiffs were present by counsel and defendant, Americom Network, Inc., was present by Larry E. Brown and Darlene D. Roberts, the plaintiffs now submit their post-hearing Memorandum of Law in support of their request for an order of transfer/turnover as to any and all rights Americom Network, Inc. ("Americom") has in and to the following telephone numbers: 1-800-WeDeliver, 1-800-FreeDelivery, 1-888-FreeDelivery, and 1-877-FreeDelivery (hereinafter referred to as the "Vanity Numbers").

I.

FACTS PRESENTED AT THE HEARING

At the hearing held in the above matter on August 7, 2000, sworn testimony given by Larry Brown and Darlene Roberts on behalf of Americom revealed that, other than a few pieces of office

EXHIBIT 1 (22 PAGES)

furniture, the sole asset owned by Americom is the right to the use of the Vanity Numbers. Americom has no other tangible assets upon which execution may issue. Plaintiffs' Verified Motion filed on June 7, 2000, reflects that the plaintiffs are the owners of an unpaid judgment against Americom in the principal sum of $330,000.00, plus interest, fees, and costs.

II.

THE RELIEF REQUESTED BY THE PLAINTIFFS

Both in their Verified Motion and at the hearing held thereon, plaintiffs requested this Court to transfer to them Americom's right to the use of the Vanity Numbers and/or to liquidate the sole corporate asset to apply the proceeds to the unpaid judgment herein. In response thereto, Americom by Larry Brown objected on the basis that his estimated value of the Vanity Numbers far exceeded the unpaid balance of the judgment in favor of the plaintiffs. No admissible evidence was submitted by Americom on this issue, and the Court indicated that it was ordering the rights to the use of the Vanity Numbers to be sold, but that the proper method of executing upon the Vanity Numbers needed to be determined. Following extensive research, plaintiffs submit the following to aid the Court in determining the proper method of liquidating the Vanity Numbers.

III.

THE ISSUES PRESENTED

The issues for determination by this Court are whether it can order the transfer of Americom's rights to the use and enjoyment of the Vanity Numbers by a sale on execution, and what is the proper method for doing so. Plaintiffs submit, and this Memorandum will support, that:

A. Transferring the rights to the use and enjoyment of the Vanity Numbers is, and will be, supported by a waiver of the regulations prohibiting such transfers;

B. Case law supports the transfer of the rights in the Vanity Numbers; and,

C. Liquidation of the rights to the use of the Vanity Numbers, being an uncommon asset, is best accomplished by a process which will foster a willing buyer-willing seller transaction, such as an on-line auction utilized in other instances involving assets without an identifiable market.

IV.

LEGAL ANALYSIS

A. Ordering the Sale is Necessary

On its face, federal regulation appears to prohibit the Vanity Numbers from being sold on execution or otherwise. See 47 CFR 52.107(2) [No person or entity shall acquire a toll free number for the purpose of selling the toll free number to another entity or to a person for a fee.]; 47 CFR 52.107 (a)(1) [The definition of hoarding . . . includes the selling of a toll free number by a private entity for a fee; Toll free subscribers shall not hoard toll free numbers.]; Industry Guidelines for Toll Free Number Administration, 2.2.1 [Toll Free numbers are not to be treated as commodities which can be bought or sold and no individual or entity is granted a proprietary interest in any Toll Free number assigned.]

Notwithstanding this apparent ban on private transfers of toll free numbers, one of the leading cases in this area squarely disagrees with this interpretation of the regulation. See Play Time, Inc. v. LDDS Metromedia Communications, Inc. aka Worldcom, Inc. or Worldcom, 123 F.3d 23; 1997 U.S. App. LEXIS 21270; 38 Fed. R. Serv. 3d (Callaghan) 718, (copy attached). The Playtime case revolved around an accidental transfer of a number by a RespOrg (responsible organization) to the wrong entity. In that case, the RespOrg argued that there could be no damages flowing from the transfer since the number itself could not be bought, sold, bartered, or released for consideration. The Court not only disagreed with this argument, but upheld a jury award of damages based upon the inherent value of a right to control a vanity number. That case supports this Court's ability to order the sale or other disposition of the Vanity Numbers.

Moreover, the FCC itself recognizes that the federal regulations prohibiting the transfer or sale of Vanity Numbers can be waived via a petition for waiver, filed in accordance with 47 CFR § 1.3. That regulation provides:

> § 1.3 Suspension, amendment, or waiver or rules.
>
> The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

In essence, an Order of this Court that the Vanity Numbers shall be liquidated to apply the proceeds to the unpaid judgment in favor of the plaintiffs would support a petition for waiver with the FCC, which in turn would allow this Court to determine how best to liquidate the Vanity Numbers without any regard to the apparent restriction on private transfers of toll free numbers. Thus, this Court entering an Order, ordering the sale and/or liquidation of the Vanity Numbers, is the first step in the process of determining the most appropriate method of the sale of this uncommon asset.

B. Petition for Waiver

Procedurally, once this Court grants an Order of Sale, plaintiffs will file with the FCC a Petition for Waiver, for good cause shown. Once granted, then any restriction on the transfer of the Vanity Numbers will no longer be an issue in this Court's determination as to the most appropriate method of liquidating the Vanity Numbers.

C. Plaintiffs' Proposal for Liquidation

Research failed to reveal any cases on point, and there is scant case law available to aid this Court in making a determination on the issues raised herein. One of the only cases found regarding valuation of toll free numbers is the Playtime case, cited *supra*; however, that case is distinguishable insofar as there was admissible willing-transferor-willing-transferee evidence as to damages associated with the improper

loss of the use of the number. There is no such evidence as to the value of the Vanity Numbers in this case, and no admissible evidence has been submitted to this Court by the defendants on this issue. In fact, obtaining any evidence on this issue will be difficult if not impossible, by any measure of the traditional methods of valuation. Accordingly, liquidation of the Vanity Numbers, where inability to properly determine their value and/or a market for their purchase, must proceed in a fashion other than that which is utilized for tangible assets with a known market.

D. On-Line Auction

To insure that the sale is conducted in a manner which is likely to bring the highest offers possible, based upon a willing-transferee-willing- transferor, plaintiffs propose that the Vanity Numbers be offered for sale in an on-line auction, such as Bid4Assets.Com. Bid4Assets.Com is an on-line auction service that is especially well-suited for unusual assets. The site offers daily auctions of other intangible assets such as web site domain names and patents.

The site affords the greatest penetration for potential purchasers of the Vanity Numbers, and the commission structure is based upon the sale price, if a sale is consummated. There is no commission due if no bids are received, if no sale is completed, and/or if no bids meet the reserve price. In the event of a sale, the expenses associated with this service range from a commission of 8% up to $25,000.00, 7% up to $100,000, gradually declining as the price paid increases. This site and auction process is utilized by United States Bankruptcy Trustees, and serves as a vehicle for effectively marketing assets such as those in this case. See In re AIOC Corporation, 1999 Bankr. LEXIS 1727 (Bankr. S.D.N.Y. Dec 20, 1999)(copy attached), wherein an on-line auction was not only approved, but determined to "yield a price that is *per se* fair and the product of good faith and arm's-length dealings."

V.

CONCLUSION

Plaintiffs pray that the Court grant the following relief:

1. Order that the right to the use and enjoyment of the Vanity Numbers be transferred, liquidated, and otherwise sold, with the proceeds therefrom being applied to plaintiffs' unpaid judgment in the above matter;

2. Once a waiver of federal regulations has been obtained and filed with this Court, that the Court authorize a sale of the Vanity Numbers by on-line auction, a procedure which in plaintiffs' belief will truly establish the fair market value of the Vanity Numbers, bring about the greatest interest in the purchase of this most unusual asset, and produce the greatest return on the sale to be applied to plaintiffs' unpaid judgment; and,

3. All other relief just and proper in the premises.

Respectfully submitted,

RUBIN & LEVIN, P.C.

By: _____
Christine Hayes Hickey
Atty. No. 17375-49

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following distribution, by first class United States Mail, postage prepaid, this 30th day of November, 2000.

Larry E. Brown
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Maddox Koeller Hargett & Caruso
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G:\WP80\ANGIE\PLEADING\Americom-Memo
(81606201)

*123 F.3d 23, *; 1997 U.S. App. LEXIS 21270, **;*
38 Fed. R. Serv. 3d (Callaghan) 718

PLAY TIME, INC., Appellee, v. LDDS METROMEDIA COMMUNICATIONS, INC., a/k/a WORLDCOM, INC. OR WORLDCOM, Appellant.

No. 96-2066

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

123 F.3d 23; 1997 U.S. App. LEXIS 21270; 38 Fed. R. Serv. 3d (Callaghan) 718

August 12, 1997, Decided

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Robert E. Keeton, U.S. District Judge.

DISPOSITION: Affirmed.

CORE TERMS: assigned, unfair, subscriber, deceptive, spare, guideline, fair market value, willing-transferor-willing-transferee, assign, miscarriage, special verdict form, customer, matter of law, jury charge, toll-free, vanity, breach of contract, harmless error, specific performance, transferee, transferor, paperwork, jury instruction, right to use, plain error, deception, quotation, real estate, non-refundable, hypothetical

COUNSEL: Joan A. Lukey, with whom Anthony A. Scibelli and Hale and Dorr, LLP were on brief for appellant.

Kenneth L. Kimmell, with whom Erin M. O'Toole and Bernstein, Cushner & Kimmell, P.C. were on brief for appellee.

JUDGES: Before Torruella, Chief Judge, Cyr, Senior Circuit Judge, and Stahl, Circuit Judge.

OPINIONBY: CYR

OPINION: [*24] **CYR, Senior Circuit Judge**. Defendant-appellant WorldCom challenges a district court judgment awarding damages [*25] for breach of its agreement to assign plaintiff-appellee Play Time, Inc. ("Play Time") a **toll-free** "800" **vanity** number. We affirm the district court judgment in all respects.

I

BACKGROUND n1

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 "We recite the facts as the jury and district court could have found them." Roche v. Royal Bank of Canada, 109 F.3d 820, 821 (1st Cir. 1997).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

WorldCom, a corporation with its principal place of business in Jackson, Mississippi, and

[**2] an office in Revere, Massachusetts, provides subscribers with specialized long-distance services, including **toll-free** "800" numbers. n2 Pursuant to industry standards, **toll-free** "800" numbers are stored in a central database known as the 800 Service Management System ("SMS/800"). All "800" numbers are reserved and assigned to subscribers by so-called Responsible Organizations ("RESP ORGs") through SMS/800.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 At the time of the relevant events, its corporate name was LDDS Metromedia Communications, Inc.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In March 1994, Play Time, a Massachusetts-based, family-owned corporation engaged in selling art supplies, was endeavoring to expand into nationwide telephonic networking aimed at the commercial real estate leasing market. Michael Levosky, a Play Time shareholder and co-manager, envisioned a nationwide referral service through which potential customers could call a **toll-free** "800" number and enter information into an automated call router which would link the caller to a real estate office near the place [**3] the caller wanted to lease commercial real estate. Play Time would generate income from the fees charged real estate brokers for their advertising and usage of the **toll-free** "800" number.

To that end, Play Time set out to obtain a suitable **vanity** number, one whose alphabetical counterpart conveyed a business message readily identified and remembered by targeted customers. Levosky decided to obtain 1-800-"367-5327" ("the Number"), which would transpose as "FOR-LEASE." WorldCom advised Levosky that the Number, though not then in use, was expected to become available a few weeks later, on or about April 20, 1994. n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 The SMS/800 system records the status of all "800" numbers. Normally, "800" numbers fall into one of five main categories: "assigned," "working," "spare," "disconnect," or "unavailable." After a subscriber advises that it no longer needs a particular "800" number, the number is allowed to age for approximately six months before reverting to "spare" status. Only numbers in "spare" status are immediately available to the next subscriber. A number in "spare" status is not assigned to any particular RESP ORG, but can be assigned to a subscriber by any RESP ORG simply by reserving it with SMS/800. Once an "800" number has been assigned to a particular RESP ORG, however, no other RESP ORG can control its status.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**4]

Levosky called the WorldCom office in Revere, Massachusetts, which handled other telephone business for Play Time, and spoke with the "800" coordinator, Martha Burton, who confirmed that the Number would become available in mid-April. Burton assured Levosky that she would obtain the Number through SMS/800 and assign it to Play Time once it attained "spare" status.

On April 20, 1994, one week after WorldCom became the RESP ORG for the Number, and the day the Number was to revert to "spare" status, Levosky reminded WorldCom to assign the Number to Play Time. n4 Notwithstanding that WorldCom had been designated the RESP ORG for the Number, however, it did not do so. Levosky called WorldCom frequently between April 20 and May 10, 1994, to ascertain why the Number had not yet been assigned to Play Time, only to be told essentially that WorldCom was checking into it.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 Any RESP ORG may reserve a number in "spare" status directly through SMS/800. The number is then "reported to" that RESP ORG, in "reserve" status. At all times relevant to this appeal, a number could remain in reserve status for up to 60 days. Thereafter, it automatically reverted to "spare" status unless it had achieved "assigned" or "working" status.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [**5]

On May 11, 1994, Levosky called Joseph Shannon, a senior account executive in WorldCom's Revere office, who assured Levosky that the Number could be assigned to Play Time once the appropriate paperwork [*26] had been completed. Levosky promptly executed the required documents and returned them to Shannon the same day; Shannon faxed them to the WorldCom RESP ORG office in San Antonio on May 12.

Although the WorldCom fax machine in the Revere office printed a receipt reflecting that the fax had been received in San Antonio on May 12, when Shannon called the San Antonio office on May 13 he was informed that the documents had never been received. Once again Shannon faxed the documents. Although the second set of documents was received in San Antonio on May 13, as confirmed by telephone, still the Number was not assigned to Play Time. Shannon was told the delay was due to difficulty in getting the Number released from SMS/800, notwithstanding the fact that WorldCom was already the RESP ORG for the Number. But see supra note 3.

Meanwhile, one Michael Eisemann had asked a WorldCom office in Indiana to obtain the Number for his real estate business. Eisemann intended to use the Number in [**6] a nationwide referral system similar to that envisioned by Levosky. On May 20, 1994, approximately two months after Levosky first made a verbal request for the Number and nine days after Levosky's first written request, Eisemann submitted the order to the WorldCom office in Indiana, with the required paperwork. Levosky's earlier requests notwithstanding, WorldCom assigned the Number to Eisemann, because its Revere office had never entered Play Time's request into SMS/800.

Unaware that Eisemann had obtained the Number, Levosky continued to inquire into its status. Although Levosky was told there had been some delay due to paperwork problems, Shannon advised him that the problems had been resolved and the Number would soon be assigned to Play Time. On May 26, Levosky dialed the Number to determine whether it would ring at Play Time's office. The call was answered instead by an employee in a Detroit, Michigan, maintenance office. Whereupon Levosky contacted WorldCom, only to be informed that there had been a computer "glitch."

Although WorldCom switched the Number to Play Time on May 27, by May 31 it was once again ringing at the Detroit maintenance office. The Number changed hands [**7] between Levosky and Eisemann four more times between May 31 and June 2, ultimately remaining with Eisemann. On June 2, Shannon tracked down the Indiana sales representative responsible for assigning the Number to Eisemann, and learned for the first time that Eisemann too had requested the Number. After Shannon informed Levosky of the problem, Levosky complained that WorldCom originally had retrieved the Number from SMS/800 at his request, more than two months earlier. Levosky then asked WorldCom to disconnect the Number pending an investigation.

Shannon and his supervisor, Charles Hurd, approached senior WorldCom management in the Revere office, urging that the Number be returned to Play Time. Hurd informed Brady

Buckley, Vice President of sales for the eastern region, that the Number had been taken from Play Time. Buckley asked Hurd how much money the Number could be expected to produce. Hurd was unable to answer the question. Buckley finally told Hurd: "F it[;]" "leave it alone."

Upon learning that the Revere office was unable or unwilling to assist him further, Levosky contacted Deborah Surrette, WorldCom Vice President for the Northeast region. When Levosky explained [**8] why the Number was so important to Play Time, Surrette promised to investigate the matter and get back to him. Surrette asked Kelle Reeves, director of customer provisioning and RESP ORG, to determine whether WorldCom policy had been followed in regard to the Number. After speaking with several people, but without attempting either to contact the Revere office or to ascertain which customer had first requested the Number, Reeves simply concluded that WorldCom had complied with industry guidelines requiring "800" numbers to be allocated on a "first-come, first-served" basis, as Eisemann's request had been the first to be entered into SMS/800. n5

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n5 Industry guidelines provide that: "Specific 800 Number requests are honored based on availability, on a first-come, first-served basis, at the time the reservation request is initiated by a RESP ORG into SMS/800." Industry Guidelines for 800 Number Administration, 2.3.1 (Issue 3.0, December 1, 1993)

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[*27] Levosky continued to urge WorldCom to return the Number to Play [**9] Time, but was told that industry guidelines prohibited its reassignment. See supra note 5. Levosky nevertheless maintained that Play Time had been the first to request the Number. WorldCom then altered course, explaining that its relationship with Levosky was not controlled by industry guidelines, which govern only the relationship between a RESP ORG and SMS/800.

At that point, WorldCom wrongly represented to Levosky that the problem had been caused by AT&T. According to WorldCom, AT&T had been the RESP ORG for the Number on the date Play Time requested it, but had released the Number to "spare" status rather than assigning it to WorldCom. To the contrary, however, AT&T was never the RESP ORG for the Number after 1993. Rather, as we have noted, WorldCom itself had been the designated RESP ORG since April 13, 1994.

Finally, WorldCom informed Levosky that the documents he had submitted through Shannon, see supra p. 4, had not been received by its San Antonio office until after the May 20th request from Eisemann, even though a WorldCom employee in San Antonio had confirmed receipt of the Levosky paperwork on May 13. Play Time brought suit against WorldCom on November 9, [**10] 1994, demanding damages and specific performance. Shortly after Eisemann was named an indispensable party in relation to the specific performance claim -- -- because he still controlled the Number -- -- he changed long-distance carriers to prevent WorldCom from returning the Number to Play Time.

Play Time then offered Eisemann an immediate $ 5,000 non-refundable deposit and an additional $ 45,000 following trial, in return for the Number. At the same time, it offered to dismiss its action against Eisemann if he would testify to the value of the Number. Eisemann countered with a demand for a $ 10,000 non-refundable deposit and $ 40,000 after trial. Their negotiations ultimately fell through because Play Time could not come up with the additional $ 5,000 non-refundable deposit.

Eisemann nevertheless testified at trial that the Number did have inherent value, explaining that "people would buy the [**vanity**] number for [its] potential value." He produced a pamphlet he had developed for marketing the Number, touting the importance of **vanity** numbers in reaching potential customers. Although Eisemann acknowledged that he was motivated to enter into an agreement with Levosky in part because [**11] he wanted to get Levosky "out of his hair," he consistently maintained that the Number had inherent value.

The jury returned verdicts for Play Time on all counts, awarding $ 50,000 in damages on each count, representing the value of the Number under a "willing-transferor-willing-transferee" standard. The total award was limited to $ 50,000, however, because the jury determined that recovery under more than one count would be redundant.

At a later hearing, the presiding judge found that WorldCom had violated Mass. Gen. Laws ch. 93A, § 11, which affords civil relief from unfair or deceptive business practices. The court determined WorldCom's conduct both unfair and deceptive, and held that it had occurred "primarily and substantially" within Massachusetts. Accordingly, the court trebled the $ 50,000 damages award made by the jury, see Mass. Gen. Laws ch. 93A, § 11 (1984), and awarded attorney fees and costs under Mass. Gen. Laws ch. 93A and the Federal Communications Act. Finally, the equitable claim for specific performance was dismissed as moot. WorldCom promptly appealed from the $ 233,334.84 judgment.

II

DISCUSSION

1. Jury Instructions and Verdict [**12] **Form**

WorldCom claims the district court erred in instructing the jury to apply a "willing-transferor-willing-transferee" standard [*28] for measuring damages. It maintains that "800" numbers are without inherent value as a matter of law, since it would violate industry guidelines and public policy to allow telephone numbers to be bought and sold on the open market.

Throughout the trial, Play Time made it very clear that it was demanding the value of the Number. Early on, the district court set itself to the task of articulating an appropriate measure of damages. WorldCom voiced no objection to the district court's proposed articulation of the measure of damages until after the close of the evidence. At that time, its trial counsel offered two cursory observations.

First, WorldCom stated that the measure of damages on the negligence claim should be different from that on the contract claim. Its second observation appears in the following exchange:

> WorldCom: Your Honor, just for the record, I haven't made any comments on the willing-assignor-willing-assignee theory. I just wanted to reflect what the record so far reflects, that by not making any comments on [**13] it, I don't adopt it as --
> The Court: Well, you'll have the opportunity to make objection.

WorldCom: Yes.

> The Court: But if you've got any alternative way of dealing with this matter, of course I want to hear it now.
> WorldCom: Right. I don't think I do other than simply to ask you to instruct the jury in accordance with my requested instruction on damages, and I expect that's what I'll simply do after closings. (Emphasis added.)

The record on appeal neither contains a proposed instruction by WorldCom nor reflects the grounds for its objection to the instruction given by the district court.

The special verdict form included a statement of the issues relating to the "willing-transferor-willing-transferee" standard, as follows:

> 1(c). What amount of money, if any, do you find to be fair and reasonable compensation, of each of the following types, for . . . breach . . . of contract? Answer in DOLLARS or NONE.
> (1) Reimbursement of losses proved by a preponderance of the evidence to have been out-of-pocket expenses.
> (2) Fair market value (as valued by the willing-transferor-willing-transferee [**14] standard) of a transfer, by Eisemann to Play Time, on or about September 21, 1995, of Eisemann's rights to use the number 800-367-5327.

The same formula was used for the contract, negligence, and Federal Communications Act claims.

The presiding judge explained the "willing-transferor-willing-transferee" standard to the jury as follows:

> The willing transferor and willing transferee are hypothetical persons created by the law to help us decide questions of valuation in circumstances in which no real persons have arrived at an exact value for the property or property rights at issue. You, as decisionmakers on this question of value, are directed to envision not the usual arm's-length transactions between real-life bargainers, but instead a transaction of the hypothetical variety - indeed of a contrary to fact variety. If the reality is that in human experience a property interest exactly like that transferred in this case has not been transferred in an arm's-length transaction between real people, you must imagine a transaction not exactly like any transaction described in the evidence before you.These hypothetical persons, the willing transferor and willing transferee, [**15] always come to an agreement. They never end their negotiations in failure. They always arrive at a value they both agree upon.The aim of factfinding by using this willing-transferor-willing-transferee standard is to help you evaluate the parties' evidence, and their arguments about evidence and about formulas and figures, and about other factors in evidence that bear upon the issue of value. You are to do your evaluation in the way you find the willing transferor and willing transferee would evaluate the same factors and arguments. [*29] To these persons different formulas suggested by opposing parties are not binding. They are only tools. The willing transferor and willing transferee do not overlook relevant evidence. They weigh every relevant factor. They are not experts, but they are attentive to expert advice. But in the end they make a pragmatic decision that enables them to come to a common value after evaluating all of the evidence and arguments before them.

After the jury charge had been delivered, the presiding judge invited objections to the charge and the special verdict form. At that point, WorldCom simply registered its objection to the "instruction on [**16] the measure of damages" relating to the "willing-transferor-willing-transferee" standard. The district court overruled the objection.

Objections to jury instructions are governed by Fed. R. Civ. P. 51, which provides in relevant part that "no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51 (emphasis added). We have "consistently held that the strictures of Rule 51 must be followed without deviation." Smith v. Massachusetts Inst. of Tech., 877 F.2d 1106, 1109 (1st Cir. 1989). See also Kerr-Selgas v. American Airlines, Inc., 69 F.3d 1205, 1213 (1st Cir. 1995). n6

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n6 The Rule 51 standard applies to the jury charge and any special verdict form. See Transamerica Premier Ins. Co. v. Ober, 107 F.3d 925, 933 (1st Cir. 1997); Clausen v. Sea-3, Inc., 21 F.3d 1181, 1195-96 (1st Cir. 1994).

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Assignments [**17] of error duly preserved pursuant to Rule 51 are subject to the "harmless error" regime set out in Rule 61, which requires the reviewing court to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Fed. R. Civ. P. 61. n7 Absent strict compliance with Rule 51, however, appellate challenges to a jury charge or verdict form cannot succeed unless the assigned error "caused a miscarriage of justice or . . . undermined the integrity of the judicial process." Scarfo v. Cabletron Systems, Inc., 54 F.3d 931, 940 (1st Cir. 1995); see also Lash v. Cutts, 943 F.2d 147, 152 (1st Cir. 1991) ("Absent timely objection, an erroneous jury instruction warrants a new trial only in the exceptional case where the error seriously affected the fairness, integrity or public reputation of judicial proceedings." (internal quotation marks omitted)); Elwood v. Pina, 815 F.2d 173, 176 (1st Cir. 1987). The latter standard -- -- "plain error" -- -- see Transamerica Premier Ins. Co. v. Ober, 107 F.3d 925, 933 (1st Cir. 1997); Kerr-Selgas, 69 F.3d at 1213; Elgabri v. Lekas, 964 F.2d 1255, 1259 (1st Cir. 1992); Elwood, [**18] 815 F.2d at 176, "'is near its zenith in the Rule 51 milieu.'" Clausen v. Sea-3, Inc., 21 F.3d 1181, 1196 (1st Cir. 1994) (quoting Toscano v. Chandris, S.A., 934 F.2d 383, 385 (1st Cir. 1991)).

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n7 WorldCom insists that the jury instruction must be reviewed de novo. Although we exercise "independent judgment in evaluating the legal correctness of the district court's jury instructions," Data General v. Grumman Systems Support, 36 F.3d 1147, 1159 (1st Cir. 1994), and may review the special verdict form for abuse of discretion, see Transamerica Premier Ins. Co. v. Ober, 107 F.3d 925, 933 (1st Cir. 1997), a party which has complied with Rule 51 nonetheless must show that the assigned error affected "substantial rights," see Fed. R. Civ. P. 61, whereas a party which has not complied with Rule 51 must demonstrate a "miscarriage of justice." See Scarfo v. Cabletron Systems, Inc., 54 F.3d 931, 940 (1st cir. 1995).

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Rule 51 requires a punctual objection identifying "distinctly the matter objected [**19] to

and the grounds of the objection." Fed. R. Civ. P. 51 (emphasis added). Here, however, WorldCom interposed no record objection to the special verdict form, as distinguished from the jury charge defining "the measure of damages." Moreover, WorldCom articulated no grounds whatsoever for its objection to the special verdict form or the jury charge.

Failure to object with the requisite particularity forfeits review under the "harmless error" rule. See Scarfo, 54 F.3d at 944; Linn v. Andover Newton Theological School, Inc., 874 F.2d 1, 5 (1st Cir. 1989); Elwood, 815 F.2d at 175-76; New York, N.H. & H.R. Co. v. Zermani, 200 F.2d 240, 245 (1st Cir. 1952). Consequently, appellate review is limited [*30] to determining whether a miscarriage of justice would occur were the asserted error not corrected. See Scarfo, 54 F.3d at 940. WorldCom can demonstrate no miscarriage of justice.

First, the "fair market value" standard defined by the district court, see supra pp. 11-12, provided the jury with a just and reasonable measure of damages under Massachusetts law in these circumstances. See Mechanics Nat'l. Bank of Worcester v. Killeen, 377 Mass. 100, 384 N.E.2d 1231, [**20] 1239 (Mass. 1979) (holding, in action for breach of contract caused by wrongful foreclosure and sale of shares of stock, plaintiff was "entitled to recover the fair market value of the stock at the time of its sale"); Hall v. Paine, 224 Mass. 62, 112 N.E. 153, 155 (Mass. 1916) (holding that "fair market value" was proper measure of damages for stock broker's breach of margin agreement caused by sale of plaintiff's shares without authorization; noting that, generally speaking, fair market value is proper measure of damages for breach of contract relating to sale of goods which have an ascertainable value on the market). Thus, at the very least, the "fair market value" standard articulated by the district court effectively foreclosed WorldCom's claim of error under the "plain error" ("miscarriage of justice.") standard. n8 The failure [to] instruct the jury on a measure of damages other than the fair market value cannot meet either standard, however, especially since the challenged instruction outlined a fair and reasonable measure of damages, and no other standard was proposed below.

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n8 Under the harmless error rubric, trial court error affects "substantial rights" only if it results in substantial prejudice or has a substantial effect on the outcome of the case. See Lataille v. Ponte, 754 F.2d 33, 37 (1st Cir. 1985) (defining harmless error, in context of challenge to admission of evidence, as "whether we can say 'with fair assurance ... that the judgment was not substantially swayed by the error'" (quoting United States v. Pisari 636 F.2d 855, 859 (1st Cir. 1981)) (alteration in original)). See also 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 61.02[2] (3d ed. 1997). In order to satisfy the "plain error" standard of review ("miscarriage of justice"), however, an appellant must show "more than the simple individualized harm which occurs whenever a litigant's failure to object . . . alters the outcome of a trial." 9 MOORE'S FEDERAL PRACTICE § 51.21[2]. Among the factors to be considered are: whether the failure to raise the claim below deprived the reviewing court of helpful factfinding; whether the issue is one of constitutional magnitude; whether the omitted argument is highly persuasive; whether the opponent would suffer any special prejudice; whether the omission was inadvertent or deliberate; and, perhaps most importantly, whether the issue is of great importance to the public. See National Ass'n of Social Workers v. Harwood; 69 F.3d 622, 627-28 (1st Cir. 1995) ("legislative immunity" defense considered on appeal despite failure to raise it below). See also 9 MOORE'S FEDERAL PRACTICE § 51.21[2]. Our case, which implicates only the question of damages for breach of a private agreement between the litigants, presents no issue of great public importance or constitutional magnitude; the Harwood factors, therefore, weigh in favor of Play Time. Nor does the present case implicate the integrity of the judicial process, as the proceedings below were conducted with meticulous attention to the rights of both parties. See Scarfo, 54 F.3d at 940.

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WorldCom misses the mark with its argument that the Number had no market value because its sale, brokering, barter, or release for a consideration was prohibited. n9 Quite the contrary, the pertinent Industry Guideline explicitly acknowledges the ultimate right of "800 Service End-User Subscribers . . . to control their 800 Service, and their reserved, active, or assigned 800 Service Numbers." Industry Guidelines for 800 Number Administration 2.2.1, P3 (Issue 3.0, December 1, 1993). n10 Instead, industry [*31] guidelines prohibit only RESP ORGs and "800" Service Providers from trading "800" numbers for valuable consideration. Id. 2.2.1, P1. Subscribers, on the other hand, are prohibited only from obtaining "800" numbers for the primary purpose of trading in them. Id. 2.2.1, P2.

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n9 The relevant industry guideline provides:

> 800 numbers are not to be treated as commodities which can be bought or sold and no individual or entity is granted a proprietary interest in any 800 number assigned. RESP ORGs and 800 Service Providers are prohibited from selling, brokering, bartering, or releasing for a fee (or other consideration) any 800 number.Reserving, Assigning, or activating (Working) 800 Numbers by RESP ORGs, 800 Service Providers, or Customers for the primary purpose of selling, brokering, bartering, or releasing for a fee (or other consideration) that 800 Number is prohibited.However, the 800 Service End-User Subscriber has the ultimate right to control their 800 Service, and their reserved, active, or assigned 800 Service Numbers.

Industry Guidelines for 800 Number Administration 2.2.1 (Issue 3.0, December 1, 1993). [**22]

n10 Similarly, the WorldCom tariff provided that subscribers have "no ownership interest or proprietary right in any particular 800 number," but explicitly stated also that "upon placing a number actually and substantially in use . . . [WorldCom] 800 Service Customers do have a controlling interest in this [sic] 800 number(s)." Tariff F.C.C. No. 2, C.3.3.3 (February 7, 1994).

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Thus, industry guidelines did not impede, let alone foreclose, a jury finding that the right to control the Number had inherent value in the marketplace. Consequently, WorldCom failed to establish that any right to use the Number was valueless as a matter of law, let alone that any "error seriously affected the fairness, integrity or public reputation of judicial proceedings." Lash, 943 F.2d at 152 (internal quotation marks omitted).

2. Judgment as a Matter of Law n11

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n11 Appellate challenges under Rule 50 face a formidable hurdle:

> Review of [a] denial of a motion for judgment as a matter of law is plenary. . . .

> We review the record in the light most favorable to the non-moving party. We will reverse the denial of such a motion only if reasonable persons could not have reached the conclusion that the jury embraced.

Ansin v. River Oaks Furniture, Inc., 105 F.3d 745, 753 (1st Cir. 1997) (internal quotation marks omitted), petition for cert. filed, 65 U.S.L.W. 3839 (U.S. June 10, 1997) (No. 96-1969).

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WorldCom also challenges the district court ruling denying its motion for judgment as a matter of law. See Fed. R. Civ. P. 50. It assigns two errors: (i) Play Time failed to establish recoverable damages, and (ii) sustained no damages from any WorldCom negligence. As WorldCom maintains that Play Time failed to prove to a reasonable certainty that it sustained any damages as a result of its failure to assign the Number to Play Time, we must inquire whether Play Time presented enough evidence to enable a reasonable jury to determine, to the requisite degree of certainty, the value of the Number. n12

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n12 WorldCom resurfaces its jury instruction challenge -- -- that the Number had no inherent value, see supra p. 9; hence, Play Time established no recoverable damages. As the Number was not valueless as a matter of law, see supra pp. 16-17, its claim must be rejected in the present context as well.

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Our inquiry is guided by Massachusetts law:

> The fundamental principle of law upon which damages [**24] for breach of contract are assessed is that the injured party shall be placed in the same position he would have been in, if the contract had been performed, so far as loss can be ascertained to have followed as a natural consequence and to have been within the contemplation of the parties as reasonable men as a probable result of the breach, and so far as compensation therefor in money can be computed by rational methods upon a firm basis of facts . . . .

John Hetherington & Sons, Ltd. v. William Firth, Co., 210 Mass. 8, 95 N.E. 961, 964 (Mass. 1911). See also Hendricks & Assocs., Inc. v. Daewoo Corp., 923 F.2d 209, 213 (1st Cir. 1991) (applying Hetherington). Thus, it was incumbent upon Play Time to establish a firm evidentiary foundation for the damages claimed, leaving no essential element to "'conjecture, surmise or hypothesis." Snelling & Snelling of Mass. Inc. v. Wall, 345 Mass. 634, 189 N.E.2d 231, 232 (Mass. 1963) (quoting Hetherington, 95 N.E. at 964). See also Air Safety, Inc. v. Roman Catholic Archbishop of Boston, 94 F.3d 1, 4 (1st Cir. 1996); Hendricks, 923 F.2d at 217.

Ample record evidence supported the $ 50,000 valuation. Eisemann testified, based on his considerable [**25] experience in the real estate leasing field, that the Number, like other **vanity** numbers, had inherent value for which would-be users were willing to pay. In addition, Eisemann and Levosky testified to their efforts to close the deal whereby Levosky was to acquire from Eisemann the right to use the Number at the agreed $ 50,000 price. Although their deal could not be consummated, it was not due to their inability to agree on

value: Levosky offered $ 50,000 for the Number; Eisemann was amenable to accepting $ 50,000, but wanted a larger downpayment, [*32] which Play Time was unable to manage.

WorldCom focuses on an admission by Eisemann that he was motivated, in part, to release his rights to the Number in order to get Levosky, who had named him as a party defendant in the lawsuit, "out of his hair." WorldCom relies also on a letter from Play Time's counsel to Eisemann, which provided in relevant part:

> My client, Play-Time, offers to enter into an option agreement whereby Play-Time pays you (or the entity that controls the Number, if different from you), $ 5000.00 for the option to purchase the right to use the Number for a total of $ 50,000.00 (i.e., $ 45,000.00 plus the $ 5000.00 [**26] down payment). In addition, Play-Time would waive its claims against you for specific performance, in exchange for your full cooperation in providing credible testimony as to the fair market value of the Number, the details of which can be worked out later.

(Emphasis added.) WorldCom argues that this letter makes it clear that at least a portion of the $ 50,000 agreed upon by Eisemann and Levosky represented the value of Play Time's agreement to drop its lawsuit against Eisemann.

Although WorldCom proposes an entirely reasonable interpretation, another is that the letter memorializes two distinct offers: the first to pay a total of $ 50,000 for Eisemann's rights in the Number; the second to drop the claims against Eisemann in exchange for Eisemann's trial testimony as to the value of the Number. Thus, the WorldCom contention that the $ 50,000 figure had not been based entirely on the value of the Number did not preclude a reasonable jury finding to the contrary. Accordingly, we conclude that the evidence on damages was adequate to withstand the WorldCom motion for summary judgment, and that the district court committed no error in submitting the case to the jury. [**27] n13

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n13 Alternatively, WorldCom homes in on the Play Time negligence claim, arguing that there can be no recovery for negligence unless Play Time sustained injury to its "person" or property. We need not discuss this argument, however, as the $ 50,000 damages award is sustainable simply on the breach of contract claim. See, e.g., Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 201 n.3 (1st Cir. 1980); see also supra pp. 8-9.

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3. Mass. Gen. Laws ch. 93A, § 11

Finally, WorldCom contends that the district court erred in awarding Play Time treble damages under Mass. Gen. Laws ch. 93A, § 11. Chapter 93A generally proscribes "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws ch. 93A, § 2 (1984). An unfair or deceptive practice between businesspeople is not actionable under section 11 unless "the actions and transactions constituting the alleged unfair method of competition or the unfair act or practice [**28] occurred primarily and substantially within the commonwealth." Mass. Gen. Laws ch. 93A, § 11 (West Supp. 1996). WorldCom contends that any unfair action in this case did not occur "primarily and substantially" within Massachusetts.

The trial court findings on the "nature, extent, and place of performance" of WorldCom's

actions are reviewed for clear error only. Clinton Hosp. Ass'n. v. Corson Group, Inc., 907 F.2d 1260, 1264 (1st Cir. 1990). On the other hand, the district court's ruling that WorldCom failed to carry its burden of proving that its conduct "primarily and substantially" occurred outside Massachusetts, see Mass. Gen. Laws ch. 93A, § 11, raises a question of law for de novo review. Roche v. Royal Bank of Canada, 109 F.3d 820, 829 (1st Cir. 1997); see also Clinton Hosp., 907 F.2d at 1264.

In determining that WorldCom's actions were unfair and deceptive, the district court focused especially on the conduct of Joseph Shannon, which it considered entirely appropriate but for WorldCom's extant agreement with Levosky. The court also relied on the testimony of Charles Hurd, Shannon's supervisor, who expressed the view that WorldCom management had mistreated [**29] Play Time. Finally, the court identified the off-color remark by Brady Buckley, see supra p. 6, as "perhaps the most dramatic demonstration of [WorldCom]'s thumb-their-nose attitude." [*33] As the district court determined, all these actions took place entirely within Massachusetts. The district court further found that the investigation conducted by Deborah Surrette and Kelle Reeves amounted to mere "window dressing," thereby enhancing the deceptiveness and unfairness to Play Time.

WorldCom mounts no serious challenge to these district court findings. Instead, it argues that most of the allegedly unfair and deceptive conduct took place outside Massachusetts. In particular, it accurately points out that the Number was assigned to Eisemann by a salesperson in Indiana and that the ultimate decision to allow Eisemann to retain the Number was made in New Jersey.

The Supreme Judicial Court has outlined a "pragmatic, functional approach," Roche, 109 F.3d at 829; see also Makino, U.S.A., Inc. v. Metlife Capital Credit Corp., 25 Mass. App. Ct. 302, 518 N.E.2d 519, 523-24 (Mass.App.Ct. 1987), further app. rev. denied, 402 Mass. 1101, 521 N.E.2d 398 (Mass. 1988), for determining whether alleged misconduct occurred [**30] "primarily and substantially" in Massachusetts. See Bushkin Assocs., Inc. v. Raytheon Co., 393 Mass. 622, 473 N.E.2d 662, 672 (Mass. 1985). n14 Its approach has been distilled into three principal inquiries: "(1) where the defendant committed the deception; (2) where plaintiff was deceived and acted on the deception; and (3) the situs of plaintiff's losses due to the deception." Roche, 109 F.3d at 829; see also Clinton Hosp., 907 F.2d at 1265-66; Bushkin, 473 N.E.2d at 672. As we noted in Clinton Hospital, however, in approaching the second Bushkin inquiry the location of the person to whom the deceptive statements are made is of special significance, as distinguished from the location of the person who uttered the deceptive statements, since "the victim's ingestion of a deceptive statement and the subsequent effects from reliance on it are what give the deceptive statement its venomous sting." Clinton Hosp., 907 F.2d at 1265-66.

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n14 Although Bushkin construed the operative language -- -- "primarily and substantially" -- -- in the context of Mass. Gen. Laws ch. 93A, § 3(1)(b)(i), as appearing in St.1967, c. 813, see Clinton Hosp., 907 F.2d at 1264, ch. 93A, § 11 uses the identical language. See id. Accordingly, we have applied the Bushkin factors to § 11 as well. See id.; see also Roche, 109 F.3d at 829-31 (referring to "Clinton Hospital factors").

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The district court analyzed only the first Bushkin factor, finding that the conduct on which it focused -- -- in particular, the actions of Joseph Shannon and Brady Buckley, see supra pp. 4-6 -- -- all took place in Massachusetts. We have explained, however, that the first Bushkin factor is the least weighty. Roche, 109 F.3d at 829; see also Compagnie Reassurance d' Ile de France v. New England Reinsurance Corp., 57 F.3d 56, 90 (1st Cir.),

cert. denied, 516 U.S. 1009, 133 L. Ed. 2d 490, 116 S. Ct. 564 (1995); Clinton Hosp., 907 F.2d at 1265-66. Although we agree with the district court, other weightier factors cut against WorldCom as well. All the unfair or deceptive statements made by WorldCom's agents were visited upon Play Time in Massachusetts. It was there that Levosky dealt with Joseph Shannon; learned that WorldCom's Revere office would not try to retain the Number for Play Time because Buckley believed any potential revenues were inconsequential; learned the results of Surrette's superficial investigation; and was provided with the numerous pretexts by WorldCom for not obtaining the Number for Play Time.

WorldCom, on the other hand, misplaces primary reliance on the location of [**32] the WorldCom agents who made the ultimate adverse decision (Surrette and Reeves in New Jersey), and the WorldCom sales office (Indiana) which obtained the Number for Eisemann. But the district court did not find the actions of the Indiana sales agent part and parcel of WorldCom's unfair or deceptive conduct. n15 Moreover, as we have noted, the first Bushkin factor is the least weighty. Finally, the location of Surrette and Reeves is insufficient to overcome the competing evidence which must be weighed under the other Bushkin factors -- -- including Levosky's receipt of the results of [*34] the Surrette and Reeves "investigation" in Massachusetts -- -- all of which indicates that the unfair and deceptive behavior took place primarily and substantially within Massachusetts. Thus, WorldCom failed to carry its burden of proving that the Chapter 93A claim was not actionable.

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n15 Similarly, WorldCom's Indiana agent would not have been able to assign the Number to Eisemann had WorldCom's Massachusetts employees followed through on the commitment to Play Time. See supra p. 5 (Indiana agent able to obtain the Number only because Revere agents failed to enter Play Time's order in computer).

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III

CONCLUSION

As we conclude that all contentions raised by WorldCom on appeal were waived or meritless, the district court judgment is affirmed. Costs are awarded to Play Time.

SO ORDERED.

Source: All Sources : Federal Legal - U.S. : **Federal Court Cases and ALR, Combined Courts**
Terms: **vanity & "toll free"** (Edit Search)
View: Full
Date/Time: Wednesday, August 16, 2000 - 9:23 AM EDT

*1999 Bankr. LEXIS 1727, **

In re **AIOC** CORPORATION and **AIOC** RESOURCES AG, Debtors.

Chapter 11, Case Nos. 96 B 41895, 96 B 41896 (TLB) (Jointly Administered)

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1999 Bankr. LEXIS 1727

December 20, 1999, Decided

CORE TERMS: dispose, encumbrances, appearing, Bankruptcy Rules, notice

COUNSEL: [*1] **AIOC** CORPORATION, By: Edward G. Moran, Chapter 11 Trustee, New York, New York.

MILBANK, TWEED, HADLEY & McCLOY LLP, By: Wilbur F. Foster, Jr., Michael N. Gottfried, New York, NY, for the Chapter 11 Trustee.

JUDGES: Tina L. Brozman, UNITED STATES BANKRUPTCY JUDGE.

OPINIONBY: Tina L. Brozman

OPINION: ORDER PURSUANT TO BANKRUPTCY CODE §§ 105(a), 363(b)(1), AND 363(f) AUTHORIZING THE CHAPTER 11 TRUSTEE TO SELL, OR OTHERWISE DISPOSE OF, ART AND SURPLUS OFFICE EQUIPMENT FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS

Upon the November 24, 1999 Motion for Entry of an Order Pursuant to Bankruptcy Code §§ 105(a) and 363(b)(1), (f) Authorizing the Chapter 11 Trustee To Sell, or Otherwise Dispose, of Art and Surplus Office Equipment Free and Clear of Liens, Claims, Encumbrances, and other Interests (the "Motion"), filed by of Edward G. Moran (the "Chapter 11 Trustee") n1; and it appearing that the relief requested in the Motion is in the best interests of the Corp. estate, its creditors, and other parties in interest; and it appearing from the affidavit of service filed with this Court that due and sufficient notice of the Motion has been given to the United States [*2] Trustee, the attorneys for the Official Committee of Unsecured Creditors, and all parties who have requested notice under Federal Rule of Bankruptcy Procedure 2002; and no objections to the Motion having been filed or otherwise received; and a hearing having been held before this Court on December 20, 1999 (the "Hearing"); and due deliberation having been had thereon and sufficient cause appearing therefor; and this Court having rendered its decision at the Hearing, which decision, findings of fact, and conclusions of law are hereby incorporated herein by reference as if fully set forth in this Order;

NOW THEREFORE,

THIS COURT FINDS AND DETERMINES THAT:

1. This Court has jurisdiction over this matter under 28 U.S.C. §§ 157(a), (b)(1) and 1334 (b); the standing referral order of the United States District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.); sections 105(a), 363(b)(1), and 363

(f) of title 11 of the United States Code (the "Bankruptcy Code"); and Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") 6004 and 6007.

2. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), [*3] (M)-(O).

3. Venue of these cases and the Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409(a).

4. Notice of the Motion and the Hearing was properly given under Bankruptcy Code § 102(1) and Bankruptcy Rules 2002, 6004, and 6007.

5. The Sale of the Art by auction in an online trading forum administered by eBay is likely to yield a price that is per se fair and the product of good faith and arm's-length dealings.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n1 Capitalized terms not defined in this Order shall have the meanings given to them in the Motion.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

UPON THE FOREGOING FINDINGS OF FACT,

IT IS HEREBY ORDERED, that the relief sought in the Motion is granted; and

IT IS HEREBY FURTHER ORDERED, that the Chapter 11 Trustee is authorized and directed to take any action, and to execute any document, that may be necessary (a) to sell or otherwise dispose of all of Corp.'s right, title, and interest in and to the Art and Surplus Office Equipment to the respective purchasers of those assets, and (b) to implement [*4] and effectuate the terms of this Order; and

IT IS HEREBY FURTHER ORDERED, that if the Chapter 11 Trustee is unable to sell any of the Art and Surplus Office Equipment at a price that will yield a net positive recovery to the Corp. estate, he is hereby authorized to dispose of any such unsold Art or Surplus Office Equipment prior to the conclusion of these bankruptcy cases in a lawful, cost-effective manner, including but not limited to discarding such property or donating it to a charitable organization of his choosing; and

IT IS HEREBY FURTHER ORDERED, that any sale or other disposition of Art or Surplus Office Equipment pursuant to this Order shall be deemed to occur free and clear of liens, claims, encumbrances, and other interests; and

IT IS HEREBY FURTHER ORDERED, that the requirement in Local Bankruptcy Rule 9013-1 (b) that any motion filed shall have an accompanying memorandum of law is hereby waived and dispensed with.

Dated: New York, New York
December 20, 1999

Tina L. Brozman

UNITED STATES BANKRUPTCY JUDGE

SEVENTH CIRCUIT APPEAL INFORMATION SHEET

Include names of all plaintiffs (petitioners) and defendants (respondents) who are parties to the appeal. Use separate sheet if needed.

District: *SOUTHERN INDIANA* *Docket No.:* *IP99-0542-C-M/S*

Division: *INDIANAPOLIS*

Plaintiffs (Appellees)	***Short Caption***	***Defendants (Appellants)***
ALAN GLOCK & CAROLYN GLOCK	*V.*	*AMERICOM NETWORK, INC., LARRY E. BROWN & DARLENE D. ROBERTS*

Current Counsel for Plaintiffs (Appellees): ***Current Counsel for Defendants (Appellants):***

(Use separate sheet for additional counsel)

Name:	*CHRISTINE H. HICKEY*	*Name:*	*LARRY E. BROWN {Dismissed 7/19/01}*
Firm:	*RUBIN & LEVIN*	*Firm:*	*PRO SE*
Address:	*342 MASSACHUSETTS AVE*	*Address:*	*P O BOX 1207*
	SUITE #500		*ASH FORK, AZ 86320*
	INDIANAPOLIS, IN 46204	*Phone:*	
Phone:	*(317) 634-0300*		

Judge:	*Larry J. McKinney*	*Nature of Suit Code:*	*890*
Court Reporter:	*GLEN CUNNINGHAM*	*Date Filed in District Court:*	*04-20-99*
	291 U.S. COURTHOUSE	*Date of Judgment:*	*07-26-01*
	INDIANAPOLIS, IN 46204	*EOD:*	*07-26-01*
	(317) 634-7292	*Date of Notice of Appeal:*	*08-27-01*

Counsel: _ *Appointed* _ *Retained* X *Pro Se*

Fee Status: _ *Paid* X *Due* _ *IFP* _ *IFP Pending* _ *U.S.* _ *Waived*

(Please mark only 1 item above)

Has Docketing Statement been filed with the District Court's Clerk's Office: _ *Yes* X *No*

Was certificate of Appealability: _ *granted;* _ *denied;* _ *pending;* X *N/A*

If certificate of Appealability was granted or denied, what is the date of the order: _

If Defendant is in Federal custody, please provide United States Marshal number (USM#):

IMPORTANT: THIS FORM IS TO ACCOMPANY THE SHORT RECORD SENT TO THE CLERK OF THE U.S. COURT OF APPEALS PURSUANT TO CIRCUIT RULE 3(a).

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ALAN GLOCK and CAROLYN GLOCK	)	
Plaintiffs,	)	IP99-542-C-M/S
vs.	)	
AMERICOM NETWORK, INC., et al.	)	
Defendants.	)	

FINAL ENTRY OF JUDGMENT

Comes now the Court and hereby issues a Final Entry of Judgment in the above matter as follows:

1. Defendant, Darlene D. Roberts, was dismissed as a party defendant herein on September 14, 2000.

2. Defendant, Larry E. Brown, was dismissed as a party defendant, without prejudice, on July 19, 2001.

3. That a Default Judgment was entered herein on January 11, 2000, against Americom Network, Inc., which this Court directs shall be, and hereby is, a final entry of judgment, in accordance with the Federal Rules of Civil Procedure, Rule 54(b).

WHEREFORE, the Court finds that there is no just reason for delay, and hereby directs that the Default Judgment entered herein on January 11, 2000, against Americom Network, Inc., constitutes a Final Entry of Judgment.

Date: July 26, 2001

Larry J. McKinney, Chief Judge
United States District Court

See attached distribution.

EXHIBIT 3